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July 6, 2006

Robert Sydney, General Counsel
Massachusetts Division of Energy Resources
100 Cambridge Street, Suite 1020
Boston, MA 02114

Re: Initial Comments in Response to Division of Energy Resource's Notice of Public Hearing on Proposed Regulations (225 CMR 14.00) dated June 2, 2006 ("RPS Public Hearing")

Dear Mr. Sydney:

TransCanada Power Marketing Ltd. ("TCPM") is pleased to submit the following comments to the Division of Energy Resources ("DOER") in response to the RPS Public Hearing on the proposed revisions to its Massachusetts Renewable Energy Portfolio Standard 225 CMR 14.00 (the "RPS Regulations").

TCPM is a competitive supplier of electricity in the Northeast United States and is a licensed electric retail supplier in the states of Massachusetts, Rhode Island, Connecticut, New Hampshire, Maine and New York. TCPM is an indirect wholly owned subsidiary of TransCanada Corporation (TransCanada), a leader in the responsible development and reliable operation of North American energy infrastructure. In addition to TransCanada's network of more than 25,600 miles (41,000 kilometers) of pipeline facilities, TransCanada owns, or has interests in, approximately 6,700 megawatts of power generation in Canada and the United States.

The following comments are solely directed to Paragraph 16 of the Summary of Proposed Revisions, as set out in the DOER's Background Document on Proposed Revisions to the RPS Regulations dated June 2, 2006, and the red-lined version of the proposed changes to 225 CMR 14.09 (2)(a) and (b), both of which are set out below:

16. Clarifies and codifies that the load obligation upon which the Retail Electric Suppliers must comply with the RPS minimum standard is to be based on the available NEPOOL GIS data representing retail load served, inclusive of distribution line losses. At 14.09 (2) (a) and (b).

.....

14.09: Annual Compliance Filings for Retail Electricity Suppliers.

....

(2) Contents of Annual Compliance Filing. For each Retail Electricity Product, the Filing shall document compliance with the provisions of 225 CMR 14.07 and 14.08 to the satisfaction of the Division and shall include, but not be limited to, the following:

(a) Total Electrical Energy Sales to End-Use Customers.

Documentation of the total MWhs of electrical energy sold by the Retail Electricity Supplier to End-Use Customers in the Compliance Year. Such sales are defined herein as the total quantity of the Supplier's certificates obligation that the Supplier correctly allocated to all of the Supplier's Massachusetts retail subaccounts in the NEPOOL GIS, pursuant to Part 4 of the NEPOOL GIS Operating Rules, or any successor rules.

(b) Electricity Sales to End-Use Customers by Product.

Documentation of the total MWhs of each Retail Electricity Product sold to End-Use Customers in the Compliance Year, verified by an independent third party satisfactory to the Division, consistent with the Guidelines. Such sales are defined herein as the quantity of the Supplier's certificates obligation that the Supplier correctly allocated to each of the Supplier's Massachusetts retail subaccounts at the NEPOOL GIS, pursuant to Part 4 of the NEPOOL GIS Operating Rules, or any successor rules. The Division shall keep product information confidential to the extent permitted by law.

COMMENTS:

The Guideline for Retail Electricity Suppliers on the Determination of Sales to End-Use Customers dated February 9, 2006 (the "2006 Guideline") articulates the reasoning behind the DOER's proposed revisions to 225 CMR 14.09 (2)(a) and (b). In the 2006 Guideline, the DOER concludes that, based on its interpretation of M.G.L. Chapter 25A, Section 11F(a) (the "RPS Statute") and RPS Regulations, 225 CMR 14.07 and 14.09, the load obligation data recorded in the NEPOOL GIS should be the sole basis of determining "retail sales to End-Use Customers".

TCPM respectfully disagrees with the DOER's conclusion and its interpretation of the aforementioned RPS Statute and Regulations. TCPM also notes that it previously submitted an objection letter dated June 16, 2005 to the DOER when TCPM was first notified via e-mail that retail suppliers would be required to meet their RPS minimum compliance percentage using load obligation data tracked in the NEPOOL GIS. TCPM continues its previous objection, and provides the following comments for the RPS Public Hearing:

1. The proposed revisions are contradictory to the Massachusetts General Laws

TCPM submits that the RPS Statute and Regulations expressly require retail suppliers to meet their RPS minimum compliance percentage using actual consumption data from their customers' meters. The RPS Statute and Regulations are clear and consistent that a retail supplier's RPS compliance is to be based on a specified percentage of "kilowatt-hours sales to End-Use Customers" or "electrical energy sold to End-Use Customers." The definition for End-Use Customers in 225 CMR 14.02 is, "[a] person or entity in Massachusetts that *purchases electrical energy at retail* from a Retail Electricity Supplier" (emphasis added). It is the customer's retail meter that dictates the quantity of electrical energy actually consumed, used and eventually paid for by the End-Use Customer.

In its Technical Information Release 98-16¹, the Massachusetts Department of Revenue (MADOR) also stated that a retail sale occurs when title or possession to electricity is transferred to the customer at its retail meter. Further, because possession of electricity will be transferred at a retail customer's meter after transmission and distribution have occurred, the transmission and distribution will occur before the retail sale.² Other Massachusetts statutes³ have been consistent with the definition of a "retail sale".

The terms "sell at retail," "sales at retail" and "retail sale" shall mean and include any transfer of title to tangible personal property for a valuable consideration made, in the ordinary course of trade or usual prosecution of the seller's business, *to the purchaser for consumption or use...*⁴ (emphasis added)

A retail supplier's End-Use Customer only consumes and uses what is measured at the retail meter. Additionally, the fact that an End-Use Customer's bill shows only the quantity of electricity that has reached its retail meter is completely consistent with the statutory meaning of a retail sale. As the DOER is aware, the NEPOOL GIS does not track load at the retail meters but instead tracks load obligations as measured at the Pool Transmission Facilities ("PTF"). The NEPOOL GIS load obligation data does not adjust for losses that occur prior the retail sale occurring at the retail meter.

In the 2006 Guideline, the DOER regards the load obligations recorded at the NEPOOL GIS as the *"quantity of electricity that each retail supplier must supply to the electricity distribution system in order to provide electricity to its End-Use Customers"*. TCPM respectfully submits that the RPS Statute and Regulations do not support this interpretation and that the DOER's interpretation contradicts the plain meaning of the legislative words. The RPS Statute and Regulations expressly require the determination of retail sales to End-Use Customers, not the quantity of electricity that retail suppliers must supply to the PTF in order serve its End-Use Customers. Although the rate charged by the retail supplier may cover, among other services, the cost of extra energy (losses) associated with delivering electricity to the End-Use Customer's meter, it should not be relevant to the determination of what constitutes a retail sale. Title or possession to the losses is not transferred to the End-Use Customer and nor do they consume or use the losses.

2. The proposed revisions are inconsistent with industry practices and the DOER's past interpretations

The terms "sales to End-Use Customers" and "retail energy purchases from a supplier" are common terms in the industry that clearly refer to sales for consumption by the customer as measured and verifiable at the customer's meter⁵, wherever that meter may be located on the distribution system.⁶ The sales captured by the NEPOOL GIS are load values as determined at the NEPOOL PTF and not

¹ Technical Information Release (TIR) 98-16: Sales and Use Tax Implications of Electric utility Restructuring. The MADOR clarifies the sales and use tax implications of electric utility restructuring and to provide guidance on the sales tax collection responsibilities of vendors selling and distributing electricity. It is available at http://www.dor.state.ma.us/rul_reg/tir/tir_98_16.htm#4Text

² MADOR, however, also states that title passage is generally determined by contract. TCPM's standard retail agreement uses the customer's retail meter as the point of title passage.

³ See definitions of 'sales' and/or 'retail sales' under M.G.L. c. 64H, § 1, M.G.L. Chapter 64C, § 13, and M.G.L. Chapter 93, § 14E

⁴ From definition of "retail sales" under M.G.L. Chapter 64C, § 13

⁵ See for example the reporting requirements for U.S. DOE Annual Electricity Power Industry Report (EIA-861), Schedule 4, Part B., where Sales to Ultimate Customers means "energy consumed" by the end-use customer.

⁶ For example, some very large end-use customers have retail meters located on the PTF.

at the customer meter, and therefore use of these values, without adjustment for line losses, is not consistent with the statutory requirements.

We also note that, when the RPS Statute was enacted, it expressly mandated the DOER to determine the *actual* percentage of kilowatt-hours sales to end-use customers in the commonwealth (emphasis added). In conducting this calculation, the DOER's consultants used retail sales measured at the customer meters to determine the actual sales to end-use customers.⁷ This methodology, we submit, is consistent with the legislative intent of the RPS Statute and Regulations.

In an e-mail from Mr. Howard Bernstein, the DOER's RPS Program Manager, dated June 10, 2004, providing guidance on the 2003 compliance filing, Mr. Bernstein directed as follows:

Please note that, if there is a discrepancy between your total MA retail load obligations in your GIS accounts for 2003 and what you KNOW to have been your actual 2003 retail sales in MA, you are obligated to use the latter as your basis for 2003 compliance. In other words, your actual retail sales take precedence over your GIS numbers in calculating how many New Renewable Generation Attributes (as RPS qualified GIS certificates, etc.) you need to meet your 1% (one percent) MA RPS compliance obligation.

The DOER states that the process described in the 2006 Guideline is consistent with the DOER's requirements and procedures for the 2003 and 2004 compliance filings. TCPM respectfully submits that this is not supported by the DOER's past actions and directives.

3. NEPOOL GIS load data is not the most appropriate, reliable or accurate

In its 2006 Guideline, the DOER concluded that the load obligation data recorded in the NEPOOL GIS "is the most appropriate, reliable, accurate, and administratively desirable source of documenting retail sales to End-Use Customers". However, as discussed above, the use of this data is inconsistent with the statutory intent and plain meaning of the term "retail sales" and therefore makes its use inappropriate. Further, much of the load data in the NEPOOL GIS is based on profiled estimates of energy usage based on class average load shapes and is neither trued-up nor adjusted for customer movements between retail suppliers. The NEPOOL GIS load data is also not adjusted for losses, which makes it inherently inaccurate and unreliable for purposes of RPS compliance.

The source of the load data in NEPOOL GIS is ISO-NE settlement data. This data is trued-up in the ISO-NE "90-day resettlement" to correct for customer shifts to different suppliers and to reconcile profiled load estimates to actual meter readings. The current timeline for ISO-NE resettlements require 120 days from the issuance of the original ISO-NE invoice. As a result, only the first month of load data corrections appear in the NEPOOL GIS for each three month trading period. For example, in Q4 2005, only the October 2005 corrected load data appeared in NEPOOL GIS while resettled November and December 2005 load data did not appear. Thus profiled loads of retail customers were not trued-up to actual meter readings in November or December of 2005 while load which changed suppliers may have been assessed to the wrong supplier in the NEPOOL GIS during this trading period. This timing issue exists in all trading periods. As a result, there are only four (4) months of corrected meter data in every twelve month compliance period in the NEPOOL GIS.

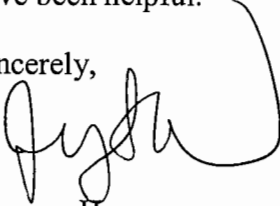
⁷ See various analyses by LaCapra Associates and/or Sustainable Energy Advantage, LLC developed under contract to the DOER, including Massachusetts Renewable Portfolio Standards, White Paper No. 6 dated October 25, 1999.

RECOMMENDATION:

Based on the above comments, TCPM respectfully requests that the DOER reject the proposed revisions to 225 CMR 14.09 (2)(a) and (b). TCPM believes that actual data from retail meters provide the most appropriate, reliable and accurate information and recommend its use for RPS compliance purposes.

We appreciate this opportunity to comment on the RPS Public Hearing, and hope our comments have been helpful.

Sincerely,

A handwritten signature in black ink, appearing to read 'Thomas Hwang', with a large, sweeping flourish extending to the right.

Thomas Hwang
Legal Advisor

cc: Michael Hachey, Director
Stuart Ormsbee, Retail Division